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No. [redacted] Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1966

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

MEMORANDUM FOR RESPONDENT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1111 Misc.

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

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MEMORANDUM FOR RESPONDENT

As set forth in the response to petitioner's application for a stay, filed on behalf of the Judicial Council by the Solicitor General, the order challenged in this case (dated December 13, 1965) was wholly interlocutory in character, *i.e.*, pending a hearing and subsequent prompt consideration by the Council regarding what use, if any, to make of its powers in the premises. On January 27, 1966, the Council issued an order setting such a hearing for February 10, 1966, in Oklahoma City, Oklahoma (Appendix A, *infra* pp. 5–7).

206-655—66——1

After the Council order setting a hearing, the Council was advised by Judge Chandler that he did not wish to be heard or to appear at such a hearing. In addition, the Council was advised, through a letter sent by Judge Chandler to the other judges of the Western District of Oklahoma on January 24, 1966 (Appendix B, *infra* pp. 8–9), that he was presently willing and able to dispose of the pending cases assigned to him prior to December 28, 1965. This letter also stated that Judge Chandler was in agreement with an order, signed by the other active judges of the Western District of Oklahoma on January 25, 1965, pursuant to which new judicial business in the district would not, until further order, be assigned to Judge Chandler.

In these circumstances, the Council met on February 4, 1966, and issued the order reproduced in Appendix C to this Memorandum (*infra* pp. 10–16). This order expressly supersedes the prior Council order of December 13, 1965. In its place it adopts a portion of the January 25 order of the active district judges of the Western District of Oklahoma—as to which Judge Chandler agreed—dealing with the assignment of new judicial business in that district. With regard to pending judicial business—as to which Judge Chandler was in disagreement with the other active district judges—it provides, consistently with Judge Chandler's wishes, that "[a]ll civil, bankruptcy, and criminal cases assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him." The January 25, 1966, order of the district judges of

the Western District of Oklahoma indicates that there were more than 170 such cases assigned to Judge Chandler as of December 28, 1965. The order of February 4 was adopted by the Council pursuant to its authority under 28 U.S.C. 137 to make "necessary orders" in situations where the district judges of any district are unable to agree upon the adoption of orders providing for the division of business among the judges of the district.

In view of the facts, (1) that the order of December 13, 1965, challenged by the petition in this case, has thus been expressly superseded by the Council's order of February 4, 1966, (2) that the Council order of February 4 confirms Judge Chandler's authority to dispose of the substantial case load presently before him, and (3) that the order of February 4 assigns new business in accordance with an order previously agreed to by Judge Chandler, the Solicitor General suggests that the petition in this case has become moot.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

APPENDIX A

In the Judicial Council of the Tenth Circuit of the United States

Special Session—January, 1966

IN THE MATTER OF THE HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA

Order

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on January 27, 1966. Council members present were:

Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

Those present constituted the entire membership of Council except Chief Judge Alfred P. Murrah who was absent because he had previously disqualified himself from participation in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

The Council gave consideration to its December 13, 1965, order in this matter, to the proceedings in the Supreme Court entitled "Honorable Stephen S.

Chandler, etc. v. Judicial Council of the Tenth Circuit of the United States, No. 1111, Miscellaneous," to the motion for stay filed therein by the petitioner, to the response thereto by the Solicitor General of the United States, and to the order of the Supreme Court entered on January 21, 1966. The Council noted the reference by the Supreme Court to the statement in the response of the Solicitor General that the Council contemplated prompt further proceedings and the order of the Supreme Court that the application for stay be denied "pending this contemplated prompt action of the Judicial Council."

IT IS ORDERED that this matter is set for hearing at 9:30 A.M., Thursday, February 10, 1966, in Room 5009 of the United States Courthouse at Oklahoma City, Oklahoma, when and where the Honorable Stephen S. Chandler may appear in person and with counsel and present such matters to the Council as he may deem fit.

The Secretary of the Council is directed to send a certified copy of this order forthwith to the Honorable Stephen S. Chandler and to his counsel, Thomas J. Kenan, 1366 First National Bank Building, Oklahoma City, Oklahoma.

DONE by the Judicial Council of the Tenth Judicial Circuit at Denver, Colorado, this 27th day of January, 1966.

/s/ David T. Lewis
DAVID T. LEWIS
Circuit Judge.

/s/ Jean S. Breitenstein
JEAN S. BREITENSTEIN
Circuit Judge.

/s/ Delmas C. Hill
DELMAS C. HILL
Circuit Judge.

/s/ Oliver Seth
OLIVER SETH
Circuit Judge.

A true copy.
Teste:

ROBERT B. CARTWRIGHT,
Clerk.

Appendix B

United States District Court
Western District of Oklahoma,
Oklahoma City, January 24, 1966.

Judge Fred Daugherty,
United States District Court,
Western District of Oklahoma,
United States Courthouse,
Oklahoma City, Okla.

Dear Judge Daugherty: Replying to your letter of January 21, regarding the suggested meeting in your chambers today at 2:00 p.m., in which you enclosed suggested order "called for by the Order of the Judicial Council" signed by all of the judges of the court except me, I have the following comment:

First, I am of the opinion that the only manner in which a Judicial Council can acquire jurisdiction to hear and determine the question of the division and assignment of cases filed in a United States District Court is by virtue of Section 28 U.S.C. 137, Paragraph 3, and then only after a district judge has certified to the Council that he disagrees with his associates as to the division and assignment of cases filed. There was in fact no disagreement among the judges nor was any disagreement certified to the Council. Every judge was receiving the cases he had requested and I had stated many times that whatever you, Judge Eubanks and Judge Bohanon agreed on, I would agree to and sign the order. I did sign such an order in accordance with the written request of the three of you and delivered it to Judge Eubanks on the morning of December 23rd, although all of you were prior thereto at all times receiving the number

of cases demanded. Only I could have disagreed and certified the question to the Council. I not only did not disagree but I agreed both orally and in writing and acted accordingly.

Specifically, I agree to that part of the order with reference to civil, bankruptcy and criminal cases filed on and after December 28, 1965, set out on the first page of the signed order presented to me, and this letter attached thereto will constitute my written agreement thereto and my election not to disagree or certify any disagreement to the Judicial Council as authorized by 28 U.S.C. 137.

With reference to cases already assigned to me, by valid agreed statutory order by virtue of 28 U.S.C. 137, referred to in the last paragraph on page one, i.e. my *pending* cases, I *disagree*. There is no provision of law that grants a Judicial Council jurisdiction over cases pending before a judge in the various stages of the judicial process after valid assignment to him. I consider it my duty to continue to assert my exclusive jurisdiction over these cases, and shall do so.

I call your attention to the fact that until this new order is finalized by this letter, the old division order is likely effective.

With kindest regards,

Sincerely,

(s) STEPHEN S. CHANDLER.

cc: Judge Bohanon
Judge Daugherty
Judge Eubanks
Judge Rizley

P.S. The statement in your letter "at your request" gives the wrong impression. We did discuss the matter.

S.C.

Appendix C

In the Judicial Council of the Tenth Circuit of the United States

Special Session—February, 1966

In the Matter of the Division of Business in the Western District of Oklahoma

Order

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on February 4, 1966. Council members present were:

Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

Absent from the meeting was Chief Judge Alfred P. Murrah who did not attend because he had previously disqualified himself from participating in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

The Council gave consideration to its December 13, 1965, order made in the matter and to all other subsequent proceedings including the order of the Council dated January 27, 1966, setting this matter for hearing at Oklahoma City upon February 10, 1966. The Council has now been advised, in writing, by each of the active district judges of the Western District of

Oklahoma, including Judge Chandler, that none wish to be heard or appear at such scheduled hearing or at all.

Among other things, this Council's order of December 13, 1965, provided as follows:

"It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper."

By letter dated January 25, 1966, the active judges of the Western District of Oklahoma, but not including Judge Chandler, submitted to this Council an agreement and signed order pertaining to the division of business within the Western District of Oklahoma and covering all new business filed on and after December 28, 1965, and also covering all cases earlier assigned to Judge Chandler and still pending on December 28, 1965.

By letter dated January 24, 1966, and sent to the other district judges within the Western District of Oklahoma, Judge Chandler stated in pertinent part:

"Specifically, I agree to that part of the order with reference to civil, bankruptcy and criminal cases filed on and after December 28, 1965, set out on the first page of the signed order presented to me, and this letter attached thereto will constitute my written agreement thereto and my election not to disagree or certify any disagreement to the Judicial Council as authorized by 28 U.S.C. 137.

"With reference to cases already assigned to me, by valid agreed statutory order by virtue of 28 U.S.C.

137, referred to in the last paragraph on page one, i.e. my *pending* cases, I disagree."

The Council FINDS and CONCLUDES that:

1. No judge of the Western District of Oklahoma wishes to be heard at the hearing set for February 10, 1966, at Oklahoma City, and that consequently such hearing would serve no useful purpose.

2. The Council is informed of the present and past administration of the business within the Western District of Oklahoma as revealed by the files and records of the Clerk of the Western District, the reports and analysis of the same by the Office of the Administrator of the United States Courts, and by this Council's continuing review of the operations of that Court.

3. The within statements of Judge Chandler disclose his present willingness to dispose of the cases assigned to and pending before him prior to December 28, 1965.

4. In the circumstances a disagreement exists as to the division of business and the assignment of cases in the Western District of Oklahoma.

5. The effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the Council to make this order under the power and authority granted to it by 18 [*sic*] U.S.C. §§ 137 and 332.

Accordingly, it is ORDERED that:

1. The hearing set by the Council order of January 27, 1966, is hereby vacated.

2. The civil and bankruptcy cases filed on and after December 28, 1965, shall be divided by lot when filed so that no person will know to whom a case is to fall until filed. The cases shall be divided as follows:

Judge Bohanon: 3 cases in 10.

Judge Daugherty: 3 cases in 10.

Judge Eubanks: 4 cases in 10.

Judge Rizley: Assist all Judges by request.

When companion cases are filed, that is, cases involving the same transaction regardless of parties, at first knowledge of such fact the companion cases shall be assigned or re-assigned to the Judge receiving the low numbered companion case under the regular procedure.

The criminal business of the Court shall be handled as follows: Beginning January 1, 1966, Judge Daugherty shall call and empanel a grand jury during January, 1966, and handle all indictments returned by it and all criminal business of the Court until April 30, 1966; Judge Bohanon shall call the grand jury into session during May, 1966, and handle all indictments returned by it and all criminal business of the Court until August 31, 1966, and Judge Eubanks shall call the grand jury into session during September, 1966, and handle all indictments returned by it and all criminal business of the Court until December 31, 1966. At the end of their respective periods for handling criminal business, each criminal Judge shall transfer to the succeeding criminal Judge all appropriate criminal cases not terminated or disposed of during his respective period.

3. All civil, bankruptcy and criminal cases assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him.

4. The division of business and assignment of cases made herein may be amended or modified by written order signed by all active judges of the Western District of Oklahoma, provided that nothing contained herein shall be construed as preventing Judge Chandler from surrendering any pending cases for re-assignment to another active judge or to prevent transfer

between judges to whom new business is assigned pursuant to this order.

5. This order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966, entitled "In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma" and shall remain in effect until the further order of the Council.

An original copy of this order shall be retained in the records of the Council; a duplicate original shall be forthwith transmitted to the Clerk of the United States Court for the Western District of Oklahoma to be imbedded in the records of the court; a copy shall be forthwith transmitted to the Chief Judge of the Court for the Western District of Oklahoma; and a copy shall be forthwith transmitted to the Associate Judges of such Court.

Made and entered by the Judicial Council of the Tenth Circuit this 4th day of February, 1966.

/s/ DAVID T. LEWIS,
Circuit Judge.

/s/ JEAN S. BREITENSTEIN,
Circuit Judge.

/s/ DELMAS C. HILL,
Circuit Judge.

/s/ OLIVER SETH,
Circuit Judge.

LEWIS, *Circuit Judge.*

I did not join in the interlocutory order of the Council of December 13 because I was unconvinced that statutory or inherent authority existed for its issuance. Subsequent events have indicated that a substantial difference of opinion may exist as to the extent of power properly accorded to the Council and certain it is that Judge Chandler very properly could,

as he did, seek to have the propriety of the December 13 order reviewed and stayed pending such review. But I cannot condone, and must protest, the subsequent public acts and statements of Judge Chandler done and made in complete disregard of the Council order and in disregard of the statutory duty of district judges under 28 U.S.C. § 332 to "promptly carry into effect all orders of the judicial council." Neither the fact, if such it be, that the Council acts in an administrative capacity and is thus without statutory or inherent power to impose judicial discipline nor the fact that Judge Chandler sincerely believes the December 13 order to be totally invalid justifies in any way his flagrant disregard of the order. Proper judicial conduct dictated compliance with the order pending orderly determination of its validity.

I do join in the order filed today. I believe the power of the Council in such regard is clearly contained both within the provisions of 28 U.S.C. § 137 and 28 U.S.C. § 332. Although the order contains no provision for continuing assignment to Judge Chandler of cases other than those pending as of December 28, I do not consider such a provision necessary. Judge Chandler has publicly announced his intent to accept senior status under 28 U.S.C. § 371(b) in the immediate future and has agreed not to participate in new business.

SETH, *Circuit Judge.*

I agree with the foregoing order of the Judicial Council except paragraph 3 which reassigns to Judge Chandler those cases which were assigned to him before December 28, 1965. In my opinion, this paragraph of the order does not go far enough. I would instead have assigned a lesser number of cases. Further, in view of the apparent disregard by Judge

Chandler of the previous order of the Council by purporting to take action in cases after December 28, 1965, which action is of doubtful validity, I would reassign such cases to other judges of the Western District of Oklahoma so that valid orders might be entered for the protection of the litigants whose rights may have been interfered with by the action of Judge Chandler. The order of the Council was in effect after December 28, 1965, and if doubt existed as to its validity it should have been challenged by Judge Chandler only in the normal way.

U.S. GOVERNMENT PRINTING OFFICE:1966